IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER PATTON, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 06-707
SEPTA, Faye L. M. Moore, and Cecil W. Bond Jr., Defendants.	:	

Memorandum and Order

YOHN, J. January ___, 2007

Plaintiff Christopher Patton brings the instant action pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA"); the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*; 42 U.S.C. § 1983; the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. § 955(a) ("PHRA"); and Article I of the Pennsylvania Constitution, against defendants Southeastern Pennsylvania Transportation Authority ("SEPTA"); SEPTA's General Manager, Faye L. M. Moore; and SEPTA's Assistant General Manager, Cecil W. Bond Jr. (collectively, "defendants"). Presently before the court is defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, for summary judgment pursuant to Federal Rule of Civil Procedure 56, as to plaintiff's claims under the PHRA against defendants Moore and Bond (Counts VII and VIII), plaintiff's claims for violation of the Pennsylvania Constitution (Counts XI, XII, and XIII) and plaintiff's demand for punitive damages. For the following reasons, defendants' motion will be granted in part and denied in part.

I. Factual and Procedural Background

A. Plaintiff's Factual Allegations

Plaintiff was hired by SEPTA on December 8, 1997 to develop and direct its Capital and Long Range Planning Department. (Second Am. Compl. ("Compl.") ¶ 14.) Defendant Moore, is the General Manager of SEPTA (*id*. at ¶¶ 6, 13); defendant Bond is the Assistant General Manager of SEPTA (*id.* at ¶¶ 7, 13). In November of 1991, plaintiff was diagnosed with Multiple Sclerosis ("MS"), which, over time, has progressively interfered with his motor coordination and speech, resulting in substantial limitations in his ability to speak, perform manual tasks, and walk. (*Id.* at ¶¶ 17-18.) SEPTA was aware of plaintiff's condition and, despite his limitations, he met and/or exceeded SEPTA's performance expectations, which was documented from 1999 through 2003. (*Id.* at ¶¶ 19-20.)

Beginning in 1999, a significant aspect of plaintiff's job was his role in the proposed Schuykill Valley Metro ("SVM") project, which was intended to provide commuter rail access from Philadelphia to Reading along the Schuykill Valley Corridor. (Compl. ¶ 21.) Plaintiff had primary responsibility for the project and supervised two assistants. (*Id.* at ¶ 22.) He periodically consulted with upper management, but worked with only minimal daily supervision (*id*. at ¶ 23); his responsibilities included meeting and negotiating with representatives from other regional transportation authorities, government officials and legislators, and discussing the SVM project with members of the press (*id*. at ¶¶ 24-25, 38). Plaintiff, with the support of Moore and Bond, advocated for a Metrorail as SEPTA's preferred means of accomplishing the SVM, primarily due to public safety concerns with alternative proposals. (*Id.* at ¶¶ 26-27, 31, 37-38, 41-43, 54.)

There was opposition from various groups and individuals to this position. (*Id.* at ¶¶ 28-30, 34-36, 40, 49-50, 53, 55.) During this time, plaintiff's motor coordination was becoming progressively more impaired and, on December 4, 2003, he fell at work. (*Id.* at ¶ 44.)

It was eventually determined in early 2004 that SEPTA's existing proposal for the project was not feasible and would have to be redefined. (Compl. ¶¶ 48, 51.) The Federal Transit Authority ("FTA") directed SEPTA and the Berks Area Reading Transportation Authority, an entity with which SEPTA had been working, to develop an alternative proposal, and reduced the level of funding it had intended to provide for the SVM project. (*Id.* at ¶¶ 48, 52.) On May 13, 2004, after inquiry from an FTA representative, plaintiff informed the representative that SEPTA would not be providing an update for the SVM project, which would have been due on August 15, 2004, given the state of the project and the cost of preparing such a report. (*Id*. at ¶¶ 56-60.) Still exploring possibilities for reviving the project, at least on a small scale, on May 24, 2004, plaintiff sent an email, copied to Bond, to a colleague at Norfolk Southern, Bill W. Schafer, detailing a proposal for getting SVM up and running on a trial basis with minimal cost. (*Id.* at ¶¶ 61-63, 65.) Plaintiff included a quip by Samuel Johnson that "it doth concentrate a man's mind wonderfully to know he shall be hanged in a fortnight." (*Id.* at ¶ 64.) In an unprecedented directive, Bond ordered plaintiff to have no further contacts and communications with outside agencies concerning the SVM project (*id.* at ¶¶ 67-68), a restriction to which plaintiff's direct reports were not subject (*id*. at ¶ 71). Later, Moore publicly humiliated plaintiff by denying that plaintiff spoke for SEPTA or that SEPTA supported plaintiff's previous statements about the project. (*Id.* at ¶ 74.)

SEPTA began a campaign to discredit plaintiff and distance itself from his previous

concerns about the project. (Compl. ¶¶ 75-76.) On June 10, 2004, Bond, with the knowledge and consent of Moore, issued a memorandum to plaintiff concerning his job performance in which he expressed concerns as to whether plaintiff was capable of performing the essential functions of his job. (*Id.* at ¶ 77.) Bond directed plaintiff to see SEPTA's medical department to ensure his fitness for duty. (*Id.*) Bond cited various examples of plaintiff's behavior that had prompted the concerns. (*Id.* at ¶¶ 78-79, 82.)

On June 24, 2004, as directed, plaintiff was evaluated by SEPTA's Medical Director, Dr. Richard A. Press, who then notified Bond that plaintiff could return to work without restrictions, but also recommended a consultation with an independent neurologist, Dr. Steven Mandel, to determine whether plaintiff had any physical limitations as to the essential functions of his job. (Compl. ¶¶ 86-89.) Bond, with the knowledge and consent of Moore, required plaintiff to schedule an appointment with Dr. Mandel (*id.* at ¶ 90), and subjected plaintiff to constant criticism and surveillance, such as micro-managing his work, making telephone calls to his staff to request opinions regarding his performance, and criticizing him in front of his staff, in contravention of SEPTA policy (*id.* at ¶¶ 90-93). Due to this environment, plaintiff became anxious and depressed (*id.* at ¶ 94), which exacerbated his ataxic symptoms, thereby further impairing his mobility and causing him to fall occasionally (*id*. at ¶ 95). Plaintiff suffered two falls on July 6 and 7, one of which occurred in the elevator at SEPTA's offices. (*Id*. at ¶ 96.) Dr. Mandel recommended plaintiff undergo a neuropsychological evaluation in order to determine whether there was a medical basis for plaintiff's recent behavioral issues at work, to which Dr. Press agreed. (*Id.* at ¶¶ 97-100.) Plaintiff underwent an eight-and-a-half hour evaluation with Dr. Thomas Sacchetti on August 2, 2004, who reported that although plaintiff did not evidence

any neurological deficits that would impact his employment, the disparity between his actual performance–as memorialized in Bond's June 10, 2004 memorandum and plaintiff's email to Schafer–could be due to an organically based lack of awareness, i.e., anosognosia, which might impair his ability to compensate with his otherwise intact intelligence. (*Id.* at ¶¶ 101, 105-06.) Dr. Press, upon receipt of the evaluation, reported to Bond that there are no constraints on the management of plaintiff's performance. (*Id.* at 107.)

Before the completion of the neuropsychological evaluation, on July 22, 2004, Bond, with the knowledge and consent of Moore, transferred responsibility for all aspects of the SVM project to plaintiff's subordinate. (Compl. ¶ 102.) Although not recommended by either neurological expert or plaintiff's own doctor, Dr. Press directed plaintiff to use a walker while on SEPTA property, dismissing plaintiff's concerns that it would exacerbate his walking impairment as vanity. (*Id.* ¶¶ 108-10.) Being forced to use a walker caused plaintiff to suffer extreme embarrassment and humiliation, and exacerbated his MS symptoms, actually making him more likely to fall. (*Id*. at ¶ 111.)

Additionally, Bond ordered plaintiff to undergo SEPTA-supervised therapeutic services through SEPTA's Employee Assistance Program. (Compl. ¶ 113.) Plaintiff alleged that SEPTA's actions toward him were based on his disability and/or SEPTA's unsubstantiated perception thereof and counsel, on his behalf, wrote to SEPTA's Legal Department articulating plaintiff's claims of discrimination and enclosing a draft of his charge of discrimination. (*Id.* at ¶¶ 114-15.) SEPTA offered to permit plaintiff to resign and twice postponed his scheduled performance evaluation. (*Id.* at ¶¶ 116-17.)

On November 16, 2004, plaintiff filed a charge of discrimination with the Equal

Employment Opportunity Commission ("EEOC"). (Compl. ¶ 119.) On November 18, 2004, plaintiff sent Dr. Press a note from his personal physician, Dr. Robert L. Knobler, stating that plaintiff ought to be permitted to use a cane instead of a walker at work (*id.* at ¶ 120); Dr. Press did not respond until December 29, 2004 and articulated his serious concerns about the health and safety of plaintiff and of his co-workers, although he agreed to allow plaintiff to use a cane (*id.* at ¶¶ 121-22). On December 13, 2004, plaintiff received his performance evaluation, which contained his first-ever marks below expectations in attendance and dependability, which Bond stated would result in further progressive remedial action if not improved. (*Id.* at ¶ 124.) Also for the first time during his career at SEPTA, plaintiff did not receive a performance increase, but instead a "One-Time Performance Appraisal Payment of $500.00." (*Id.* at ¶ 125.) On January 19, 2005, plaintiff wrote to Bond to contest Bond's allegations of plaintiff's poor performance, telling Bond that he believed Bond's conduct was in retaliation for plaintiff's filing of a charge with the EEOC. (*Id.* at ¶ 128.)

Due to the continued oversight of plaintiff and elimination of his job duties, plaintiff's stress level increased, which, in turn, exacerbated his depression and anxiety such that he missed work more frequently and his symptoms of MS were exacerbated. (Compl. ¶¶ 129-31.) Eventually, it was necessary for him to request a medical leave of absence, which he applied for on April 15, 2006. (*Id.* at ¶¶ 132-33.) As a result of the stress plaintiff endured, his condition has been permanently exacerbated and he has not returned to work. (*Id.* at ¶¶ 134-35.)

B. Procedural History

On November 16, 2004, plaintiff filed a charge of discrimination with the EEOC and the Pennsylvania Human Rights Commission ("PHRC"). (Compl. ¶¶ 9-10.) The complaint listed

SEPTA as the respondent and alleged that SEPTA has discriminated against him on the basis of disability and retaliated against him for his protected activities. (Ex. 2 of Def.'s Mot. 1-7; Ex. A of Pl.'s Resp. 12-15.) In the complaint, plaintiff provided background on his duties and position at SEPTA, and stated that in or around July 2000, plaintiff's supervisor in the Capital and Long Range Planning Department became Cecil W. Bond, Jr. The complaint contained eight instances of discriminatory and retaliatory conduct attributable to SEPTA, as follows:

> Respondent has engaged in disability discrimination and retaliation against me by engaging in the following behavior:
>
> (1) Writing a fabricated memorandum that is wrongfully critical of my work performance;
>
> (2) Restricting my ability to perform the essential functions of my job by prohibiting me from speaking with representatives of outside agencies, without first receiving permission from my immediate supervisors;
>
> (3) Demoting me by removing me from Septa's largest capital project, which I have directed for more than four years;
>
> (4) Directly discriminating against me based on my disability by forcing me, without any legitimate business reason, to undergo a comprehensive medical evaluation with Septa's "company doctor" and a neurological and neuropsychological evaluation with doctors hired by Septa;
>
> (5) Directly discriminating against me based on my disability by forcing me, without any legitimate business reason, to attend a talk-therapy session with a counselor employed by Septa through Septa's Employee Assistance Program;
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> (6) Directly discriminating against me based on my disability by forcing me, without reasonable medical justification or any legitimate business reason, to use a walker at any time when on Septa's property;
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> (7) Directly discriminating against me based on me [sic] disability by refusing to provide me with my annual performance review; and,
>
> (8) Directly discriminating against me based on my disability by causing me to work in an atmosphere that his [sic] hostile to my disability constituting a hostile

work environment.

> Respondent's management has shown a lack of sensitivity and knowledge of the Americans with Disabilities Act. Respondent's actions constitute unlawful discrimination under the ADA.

(Ex. 2 of Def.'s Mot. 4; Ex. A of Pl.'s Resp. 14.) The EEOC issued a dismissal and notice of right to sue in connection with the charge on November 29, 2005. (Compl. ¶ 11.)

On February 17, 2006, plaintiff filed a *pro se* complaint, commencing the instant action. Defendants filed a motion to dismiss and plaintiff petitioned the court for appointment of counsel, which was granted. On May 26, 2006, plaintiff filed an expanded amended complaint, and thereafter filed a second amended complaint on June 9, 2006. Plaintiff's most recent complaint contains thirteen counts, summarized as follows. SEPTA intentionally discriminated against plaintiff in violation of the ADA (Count I), the Rehabilitation Act (Count II), and the PHRA (Count III); SEPTA retaliated against him and subjected him to a hostile work environment due to his opposition to that discrimination in violation of the ADA (Count IV), the Rehabilitation Act (Count V), and the PHRA (Count VI); Moore and Bond aided and abetted SEPTA and each other in discriminating and retaliating against plaintiff in violation of the PHRA (Count VII and VIII); Moore and Bond have violated plaintiff's federally protected rights pursuant to the Rehabilitation Act and Section 1983 (Count IX and X); and Moore, Bond, and SEPTA have violated plaintiff's right to free speech pursuant to Article I of the Pennsylvania Constitution (Count XI, XII, and XIII).[1] Defendants filed the instant motion to dismiss, pursuant to Rule 12(b)(6) or, in the alternative, for summary judgment pursuant to Rule 56. Plaintiff has

[1]Plaintiff mistakenly used the same count number (Count XI) for separate claims against Moore and Bond. The court will refer to the counts in sequential order to avoid confusion.

filed a response, to which defendants have filed a reply.

II. Discussion

A. Standard of Review

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In evaluating a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989) (citing *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 273 (3d Cir. 1985)). The court may dismiss a complaint, "only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swin Res. Sys., Inc. v. Lycoming County*, 883 F.2d 245, 247 (3d Cir. 1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). However, a court need not credit a plaintiff's "bald assertions" or "legal conclusions." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

B. Plaintiff's PHRA Claims Against Defendants Moore and Bond

Defendants assert that plaintiff's PHRA claims against Moore and Bond must be dismissed because plaintiff failed to exhaust his administrative remedies with respect to those claims.[2] A plaintiff must exhaust all administrative remedies by filing a charge of discrimination

[2]The court will treat the defendants' motion as one to dismiss pursuant to Rule 12(b)(6) as the court is permitted to consider plaintiff's EEOC complaint without converting the motion to dismiss to a summary judgment motion. *See Fugarino v. Univ. Servs.*, 123 F. Supp. 2d 838, 841 (E.D. Pa. 2000) ("Although generally courts may not look beyond the complaint in deciding a motion to dismiss under Rule 12(b)(6), they may do so to examine matters of public record

with the PHRC or EEOC before filing suit under the PHRA. *Kunwar v. Simco*, 135 F. Supp. 2d 649, 653 (E.D. Pa. 2001). "The purpose of requiring an aggrieved party to resort first to the [administrative body] is twofold: to give notice to the charged party and provide an avenue for voluntary compliance without resort to litigation." *Glus v. G. C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977). Generally, the subsequent action cannot be maintained against a defendant who was not named in the administrative charge. *See Snead v. Hygrade Food Prods. Assocs.*, 1998 U.S. Dist. LEXIS 20296, at *4 (E.D. Pa. Dec. 28, 1998) (stating that "[g]enerally, a Title VII action may not be maintained against a defendant who was not named as a defendant in the administrative complaint [and w]hile the PHRA contains no analogous requirement, courts have held that the PHRA should be interpreted consistently with Title VII") (citing *McLaughlin v. Rose Tree Media Sch. Dist.*, 1 F. Supp. 2d 476, 481 (E.D. Pa. 1998)); *see also*, *Zarazed v. Spar Mgmt. Servs*., 2006 U.S. Dist. LEXIS 3302, at **17-18 (E.D. Pa. Jan. 26, 2006). A plaintiff's claims are preserved as long as he names the defendant in the body of the administrative complaint because it provides the defendant with the requisite notice that the defendant's conduct is under formal review; a defendant need not be named in the caption as a respondent. *McInerney v. Moyer*, 244 F. Supp. 2d 393, 398-99 (E.D. Pa. 2002). However, even where a plaintiff has failed to name the defendant in the administrative complaint, the Third Circuit has recognized "an exception when the unnamed party received notice and when there is a shared

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referenced or incorporated in the complaint. Because Plaintiff's EEOC charge of discrimination meets these criteria, we may properly consider it."(citations omitted)); *see also Lightcap-Steele v. KidsPeace Hosp., Inc*., 2006 U.S. Dist. LEXIS 24518, at *13 n.2 (E.D. Pa. Apr. 27, 2006) (detailing cases where the court considered the administrative "record for the purpose of determining whether procedural predicates for a claim had been met (such as whether administrative remedies have been exhausted) or whether the claim was filed in a timely manner").

commonality of interest with the named party." *Schafer v. Bd. of Pub. Educ. of Sch. Dist.*, 903 F.2d 243, 252 (3d Cir. 1990) (citing *Glus*, 629 F.2d at 251).[3]

Because defendant Bond was named in plaintiff's administrative complaint and because both defendants Moore and Bond had notice of plaintiff's claims and shared a commonality of interest with SEPTA, I will deny defendants' motion to dismiss plaintiff's claims under the

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[3]Although the parties have not explicitly addressed the issue, a few courts in this district have found this exception applicable only where the plaintiff was unrepresented by counsel at the time of filing the administrative charge. *See e.g., Fordham v. Agusta Westland N.V.*, 2007 U.S. Dist. LEXIS 2979, at *8 (E.D. Pa. Jan. 11, 2007) (citing *Cronin v. Martindale Andres & Co.*, 159 F. Supp. 2d 1, 9 (E.D. Pa. 2001)); *Christaldi-Smith v. JDJ, Inc*., 367 F. Supp. 2d 756, 764 n.3 (E.D. Pa. 2005). This threshold requirement appears to derive from district court cases in the Second Circuit. *See e.g., Sharkey v. Lasmo (AUL Ltd.)*, 906 F. Supp. 949, 954 (S.D.N.Y. 1995); *see also*, *Lightcap-Steele*, 2006 U.S. Dist. LEXIS 24518, at *23 n.8 (acknowledging, but not deciding, plaintiff's argument that the threshold determination of whether plaintiff was represented by counsel when the administrative complaint was filed should not be followed because it was based on a New York federal court case that did not involve a state remedy). The Third Circuit has never mentioned, let alone endorsed, this threshold requirement that the plaintiff be unrepresented when the administrative complaint was filed. *See Schafer*, 903 F.2d at 252; *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 127-128 (3d Cir. 1985); *Glus*, 562 F.2d at 888. Moreover, it is unrelated to the Third Circuit's stated purposes for requiring an aggrieved party to file first a complaint with the appropriate state or federal agency before filing suit: to give notice to the charged party and provide an avenue for voluntary compliance without resort to litigation. *Glus*, 562 F.2d at 888; *see also Kunwar*, 135 F. Supp. 2d at 653 (stating that the purpose behind this rule is to alert the implicated parties and to encourage an informal conciliation process in lieu of trial) (citing *Dreisbach v. Cummins Diesel Engines, Inc.*, 848 F. Supp. 593, 595 (E.D. Pa. 1994)). Lastly, recognizing such a requirement would be adverse to plaintiffs in a manner that does not comport with the Third Circuit's mandate that "the jurisdictional requirements for bringing suit under Title VII should be liberally construed." *Glus*, 562 F.2d at 887-888 (approving *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 183 (D.C. Cir. 1974) ("We do not believe that the procedures of Title VII were intended to serve as a stumbling block to the accomplishment of the statutory objective. To expect a complainant at the administrative stage, usually without aid of counsel, to forsee and handle intricate procedural problems which could arise in subsequent litigation, all at the risk of being cast out of court for procedural error, would place a burden on the complainant which Congress neither anticipated nor intended)). Therefore, I will not apply this threshold requirement to plaintiff.

PHRA as to Moore and Bond (Counts VII and VIII). Plaintiff explicitly named defendant Bond in the complaint, stating, "In or around July 2000, after Septa reorganized . . . [m]y new supervisor in the Capital and Long Range Planning Department became Cecil W. Bond, Jr." (Ex. 2 of Def.'s Mot. 3; Ex. A of Pl.'s Resp. 13.) Thus, defendant Bond was expressly named in the complaint. Defendants argue that such a reference is insufficient to put Bond on notice that he had engaged in discriminatory conduct. (Def.'s Mot. 6.) I disagree. The explicit mention of Bond as plaintiff's supervisor during the period when the allegedly discriminatory and retaliatory conduct took place is sufficient to put Bond on notice that he was directly involved in plaintiff's claims and, as such, he "received every indication that [his] conduct was being formally reviewed." *Kinnally v. Bell of Pa.*, 748 F. Supp. 1136, 1140 (E.D. Pa. 1990).

Bond and Moore also received notice and shared a commonality of interest with the named party such that plaintiff has the right to maintain suit under the PHRA against those defendants. Plaintiff's administrative complaint contained allegations of respondent SEPTA's discriminatory and retaliatory conduct. (Ex. 2 of Def.'s Mot. 4; Ex. A of Pl.'s Resp. 14.) All of the conduct described therein is directly attributable to either Moore or Bond, or both. For example, plaintiff stated in his first allegation of discrimination and retaliation that respondent "[wrote] a fabricated memorandum that is wrongfully critical of my work performance." (Ex. 2 of Def.'s Mot. 4; Ex. A of Pl.'s Resp. 14.) This memorandum was issued by Bond, with the knowledge and consent of Moore. (Compl. ¶ 77.) In his second allegation of discrimination and retaliation, plaintiff stated that respondent has "restrict[ed] my ability to perform the essential functions of my job by prohibiting me from speaking with representatives of outside agencies without first receiving permission from my immediate supervisors." (Ex. 2 of Def.'s Mot. 4; Ex.

A of Pl.'s Resp. 14.) The immediate supervisors to whom plaintiff was referring are Bond and Moore. (*See* Compl. ¶ 67.) As all eight allegations of discriminatory and retaliatory conduct are attributable to the personal actions of Moore or Bond, or both, they received the requisite notice that their conduct was under review. *See Dixon v. Phila. Hous. Auth.*, 43 F. Supp. 2d 543 at 545-46 (E.D. Pa. 1999) (explaining that defendants had received notice where "the unnamed parties were individuals who had committed the allegedly discriminatory acts attributable to the named party, and the administrative complaint described the conduct and asserted that conduct was part of the discrimination by the named party"); *c.f. McInerney*, 244 F. Supp. 2d at 399 (concluding that defendant could not be sued in his individual capacity as he "is not named anywhere in the administrative complaints, and there are no allegations therein that his personal conduct contravened the law").

Moore and Bond share a commonality of interest with the named party, SEPTA. "Because SEPTA is liable for the discriminatory acts of its employees, one could reasonably expect SEPTA to represent the individuals' interests regarding voluntary conciliation and compliance efforts." *Duffy v. SEPTA*, 1995 U.S. Dist. LEXIS 6611, at *8 (E.D. Pa. May 12, 1995); *c.f. Dixon*, 43 F. Supp. 2d at 546 (concluding that there is no commonality of interest where plaintiff had alleged different acts of discrimination as to the named and unnamed parties). Thus, defendants' motion to dismiss plaintiff's claims under the PHRA against Moore and Bond for failure to exhaust is denied.

C. Plaintiff's Claims Under the Pennsylvania Constitution

Defendants argue that plaintiff's claims for damages for violation of Article I of the

Pennsylvania Constitution should be dismissed because there is no private right of action for money damages for violation of the Pennsylvania Constitution. Defendants cite several cases from district courts in this circuit that have held that the free speech provision of the Pennsylvania Constitution, Article I, Section 7, does not establish a private cause of action for money damages. *See, e.g.*, *Dooley v. City of Philadelphia*, 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001). Plaintiff responds that under the detailed analysis laid out by the Pennsylvania Commonwealth Court in a recent decision, *Jones v. City of Philadelphia*, 890 A.2d 1188 (Pa. Commw. Ct. 2006) (en banc), defendants have not met their burden of establishing that Article I, Section 7 of the Pennsylvania Constitution does not provide a damage remedy. Plaintiff also points out that the cases cited by defendants either pre-date *Jones* or relate to other constitutional provisions. Because plaintiff's claims under the Pennsylvania Constitution raise novel or complex issues of state law, I will decline to exercise supplemental jurisdiction over those claims.

In *Jones*, the Commonwealth Court examined the extent to which Article I, Section 8 of the Pennsylvania Constitution provided a civil cause of action for money damages. 890 A.2d 1188. The *Jones* court recognized that "[t]o date, neither Pennsylvania statutory authority, nor appellate case law has authorized the award of monetary damages for a violation of the Pennsylvania Constitution." *Jones*, 890 A.2d at 1208. The *Jones* court also took notice of the fact that neither had federal courts authorized a civil cause of action for money damages under any provision of the Pennsylvania Constitution, either failing to reach the merits of such a claim or declining to exercise jurisdiction. *Id.* at 1208 n.33 (cataloging federal court cases wherein the court either dismissed state constitutional claims or declined to exercise jurisdiction). The

Commonwealth Court undertook an extensive two-step analysis, first examining the scope of the individual's right to be protected under the Pennsylvania Constitution and whether that protection is coextensive with or greater than the protection under the Federal Constitution, and second, determining whether it was necessary for the court to create a remedy under the Pennsylvania Constitution to enable the individual to recover money damages for violation of the Pennsylvania Constitution. *Id.* at 1193. Ultimately, the court held that "in this case, there is no separate cause of action for monetary damages for the use of excessive force in violation of Article I, Section 8 of the Pennsylvania Constitution." *Id.* at 1216. Thus, although not recognizing a separate cause of action in that case, the court implicitly accepted the predicate notion that a private right of action *could* exist under the Pennsylvania Constitution. *See id*. at 1193, 1216.

Plaintiff would have this court undertake the extensive analysis of Pennsylvania Constitutional law explicated in *Jones*. However, this court is inappropriately suited to that task as the availability of money damages for violations of the Pennsylvania Constitution is unsettled and has not been addressed by the Pennsylvania Supreme Court. *See Stambaugh's Air Serv. v. Susquehanna Area Reg'l Airport Auth*., 2006 U.S. Dist. LEXIS 15844, at *10 (M.D. Pa. Mar. 16, 2006) (recognizing that the Pennsylvania Supreme Court has not yet settled the issue of whether a plaintiff may seek monetary damages for state constitutional violations); *see also Millar v. Windsor Twp.*, 2005 U.S. Dist. LEXIS 17433, at *9 (M.D. Pa. June 24, 2005) ("Pennsylvania courts are charged with interpreting the commonwealth's constitution, and thus play a decisive role in determining the relief afforded for violations of its provisions."). The application of the principles espoused in *Jones* to the Pennsylvania Constitutional provision at issue "raises a novel

or complex issue of State law," a ground for which the court, in its discretion, may decline to exercise jurisdiction. 28 USCS § 1367(c)(1); *see also Trump Hotels & Casino Resorts v. Mirage Resorts*, 140 F.3d 478, 487 (3d Cir. 1998) ("A court may decline to exercise supplemental jurisdiction over a state law claim where 'the claim raises a novel or complex issue of state law.'"). As such, I will decline to exercise jurisdiction over plaintiff's claims under the Pennsylvania Constitution and those claims will be dismissed without prejudice. *See Trump Hotels*, 140 F.3d at 487 (affirming district court's refusal to exercise supplemental jurisdiction over a New Jersey Constitutional question as it was "better left to the New Jersey courts to determine"); *Laughman v. Pennsylvania*, 2006 U.S. Dist. LEXIS 15841, at **27-28 (M.D. Pa. Mar. 17, 2006) (citing numerous cases where "district courts have recognized that the issue of whether an action for monetary damages for violations of the Pennsylvania constitution is a 'novel or complex issue of State law' and accordingly, have declined to exercise supplemental jurisdiction").

D. Plaintiff's Demand for Punitive Damages

Defendants argue that plaintiff's demand for punitive damages should be dismissed. Plaintiff's complaint states that plaintiff seeks relief in the form of, *inter alia*, "punitive damages for the losses he sustained as a result of Defendant's [sic] discriminatory treatment." (Compl. ¶ 29.) The demand for punitive damages does not specify to which claims or which actors the demand refers. In plaintiff's response to the instant motion, plaintiff clarifies: "Plaintiff does not seek punitive damages against SEPTA; his claims for punitive damages are directed against the individual Defendants only pursuant to Section 1983 and/or his state Constitutional claims." (Pl.'s Resp. 1 n.1.) Accordingly, as punitive damages are not recoverable against SEPTA, *see*

Bolden v. SEPTA, 953 F.2d 807, 830, 831 (3d Cir. 1991), not recoverable under the PHRA, *see Gagliardo v. Connaught Labs.*, 311 F.3d 565 n.3 (3d Cir. 2002), and not recoverable pursuant to the ADA or Rehabilitation Act, *see Barnes v. Gorman*, 536 U.S. 181, 189 (2002), defendants' motion to dismiss plaintiff's demand for punitive damages as to those claims will be granted.[4] As such, plaintiff's demand for punitive damages against Moore and Bond with respect to his § 1983 claims is undisturbed. *See Smith v. Wade*, 461 U.S. 30, 56 (1983) (articulating standard for assessing punitive damages under § 1983).

III. Conclusion

For the foregoing reasons, defendants' motion to dismiss will be granted as to plaintiff's claims for violation of the Pennsylvania Constitution against all defendants and as to plaintiff's demand for punitive damages against SEPTA, and claims under the ADA, the Rehabilitation Act, and the PHRA. The balance of defendants' motion is denied. An appropriate order follows.

[4]As this court has declined to exercise supplemental jurisdiction over plaintiff's claims under the Pennsylvania Constitution, *see supra* Part II.C, the demand for punitive damages with respect to those claims is moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER PATTON, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 06-707
SEPTA, Faye L.M. Moore, and Cecil W. Bond Jr., Defendants.	:	

Order

AND NOW on this _____ day of January 2007, upon consideration of defendants' motion to dismiss (Doc. No. 17), plaintiff's response thereto (Doc. No. 18), and defendants' reply (Doc. No. 20), it is hereby ORDERED that the motion is GRANTED in part as follows:

(1) Plaintiff's claims for violation of the Pennsylvania Constitution, Counts XI, XII, XIII of plaintiff's complaint, are hereby dismissed without prejudice; and

(2) Plaintiff's request for punitive damages against defendant Southeastern Pennsylvania Transportation Authority, and against all defendants under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*; and the Pennsylvania Human Relations Act, 43 Pa. Stat. § 955(a) is hereby dismissed with prejudice.

Defendants' motion for summary judgment, in the alternative, is dismissed without prejudice.

_____

William H. Yohn Jr., Judge